UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EASTERN BAND OF CHEROKEE INDIANS, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Defendants.	)	Civil Action No. 1:20-cv-00757-JEB

THE CHEROKEE NATION'S MOTION TO INTERVENE AND STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT

Interested Party, the Cherokee Nation, moves pursuant to Federal Rules of Civil Procedure Rule 24 to intervene in the case as Intervenor-Plaintiff. Intervention as of right is warranted because the Cherokee Nation's interests in protecting its aboriginal, historical and treaty territory, along with items of Cherokee cultural and ceremonial patrimony found therein, will not be adequately represented by Plaintiff Eastern Band of Cherokee Indians ("Eastern Band"). In this instance, Defendant United States Department of the Interior ("DOI"), Defendant United States Bureau of Indian Affairs ("BIA"), Defendant DOI Secretary David Bernhardt, Defendant Assistant Secretary for Indian Affairs Tara Sweeney, and Defendant Acting BIA Eastern Regional Office Director R. Glen Melville (collectively, "Defendants"), wholly and completely failed to provide notice, an invitation to consult, or any communication or disclosure whatsoever to the Cherokee Nation concerning Catawba's Kings Mountain project and land into trust application within Cherokee aboriginal, historical and treaty territory, thereby violating the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 300101 *et seq*., the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., the Administrative Procedure Act "APA"), 5 U.S.C. § 701 *et seq*, and other laws.

As the sovereign Tribal Nation entitled to consultation concerning this land into trust agency action, no entity or party can adequately represent the Cherokee Nation's interests but the Cherokee Nation. Although the Cherokee Nation and the Eastern Band share a history, after a series of federal policies and federal removal, the two now constitute separate, distinct Tribal Nations entitled to independent government-to-government relationships with the United States—and Defendants cannot send a letter to the Eastern Band and consider that a completion of their obligation to consult with the Cherokee Nation. The Cherokee Nation's independent interests in protecting its aboriginal, historical and treaty territory, along with items of Cherokee cultural and ceremonial patrimony found therein, will be gravely impaired if the Cherokee Nation is not permitted to intervene under Fed. R. Civ. P. 24(a)(2).

In the alternative, permissive intervention is warranted under Rule 24(b)(1)(B), as the Cherokee Nation's defense of its rights that Defendants violated would have numerous questions of law and fact in common with the Eastern Band positions.

In support of this motion, the Cherokee Nation relies on the Nation's Statement of Points and Authorities contained herein. The Cherokee Nation's proposed Complaint in Intervention is attached hereto as Exhibit A.

Counsel for the Cherokee Nation has circulated a copy of the attached Complaint with counsel for the parties in this case and has sought to intervene unopposed. Plaintiff Eastern Band does not oppose the motion and counsel for the United States did not consent to the motion. Counsel for Intervenor-Defendant Catawba Indian Nation, could not formulate a position in the time provided and will file a response to the motion once it does so.

STATEMENT OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Cherokee Nation seeks to intervene to assert its opposition to Defendant Assistant Secretary Tara Sweeney's March 12, 2020 Decision, ECF No. 1-2, to take lands into trust for the Catawba Indian Nation within Cherokee aboriginal, historical and treaty territory, as well as the Defendants' actions in issuing a Finding of No Significant Impact ("FONSI") and Final Environmental Assessment ("Final EA"), rather than undertaking an Environmental Impact Statement ("EIS"), as well as Defendants' failure to comply with the NHPA, NEPA, APA and other federal laws.

Because Defendants willfully and blatantly violated the NHPA, NEPA, APA and other laws, the Cherokee Nation easily satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). Even though the Kings Mountain Site sits within Cherokee Nation's historical homelands, Defendants developed their plans, and conducted their environmental review process, without ever engaging with—or even sending a communication to- the Cherokee Nation. The Defendants announced their decision to take lands into trust for the Catawba Indian Nation in Cleveland County, North Carolina, within the Cherokee Nation Historic treaty territory, on March 12, 2020. Defendants' failure to notify the Cherokee Nation, failure to consult with the Cherokee Nation, and failure to communicate with the Cherokee Nation or otherwise disclose to the Cherokee Nation information about the March 12 Decision and the planning and processes leading up to a Final EA harms Cherokee cultural, historical, and religious sites and resources, and threatens to irreparably destroy the Cherokee Nation's sovereign right to consult with federal agencies before a major federal action is undertaken that

would remove the Cherokee Nation's right to repatriate human remains and cultural resources discovered within the Cherokee Nation's historical homelands.

II. BACKGROUND

B. The Cherokee Nation and The Kings Mountain Site

The Cherokee Nation has been connected to the lands that now comprise Cleveland County, North Carolina, and the Kings Mountain Site since time immemorial. Lands located within the State of North Carolina, including the Kings Mountain, Site were ceded by the Cherokees in the Treaty of July 20, 1777. The Cherokee Nation continues to maintain cultural sovereignty over its historic treaty territory and regularly consults with federal agencies, private organizations and companies, and individuals to ensure NHPA and NEPA compliance.

C. Agency Proceedings and This Action

On March 12, 2020, Defendant Assistant Secretary Tara Sweeney issued a final agency action, on behalf of the Defendants, granting the Catawba Indian Nation's Kings Mountain Site land-into-trust request. At no time during the multi-year process that resulted in the March 12 Decision did Defendants reach out to the Cherokee Nation to consult on Catawba's Kings Mountain Site land-into-trust application. Nor did Defendants give the Cherokee Nation any opportunity to engage in the planning and development that led to a FONSI and Final EA, rather than an EIS. Defendants never inquired with the Cherokee Nation as to how the March 12 Decision might affect the Cherokee Nation. Not only did Defendants fail to consult with the Cherokee Nation, Defendants made no attempt whatsoever to communicate with the Cherokee Nation about the Kings Mountain Site—not through email, not through in-person meetings, and not by any other means of communication.

Five days after the Defendants' March 12 Decision, the Eastern Band of Cherokee Indians ("Eastern Band") filed this action, claiming that Defendants' March 12 Decision, along with its actions leading up to the March 12 Decision, violated no fewer than three federal laws—the APA, the NHPA, the NEPA. The Eastern Band seeks a declaration that Defendants' March 12 Decision is unlawful, a preliminary injunction against taking the land into trust, and other relief. *Id.* at 43. The Eastern Band concurrently sought a temporary restraining order against the Kings Mountain Site being taken into trust, but the parties agreed that the Catawba Nation would not submit land title documents to the Department to complete the land into trust transaction until Monday, May 4, 2020.

D. The Cherokee Nation's Interest in the Present Action

In addition to Defendants' total and complete failure to provide any notice whatsoever to the Cherokee Nation, failure to invite the Cherokee Nation to participate in any consultation on Catawba's Kings Mountain Site project and the March 12 Decision, and failure to communicate or otherwise disclose to the Cherokee Nation their intent to take the lands into trust for another tribe in Cherokee aboriginal, historical and treaty territory.

III. ARGUMENT

A. THE CHEROKEE NATION HAS ARTICLE III STANDING TO INTERVENE

As a threshold matter, "intervenors must demonstrate Article III standing." *Deutsche Bank National Trust Company v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013). Article III standing "requires a showing of injury-in-fact, causation, and redressability." *Id.* The Cherokee Nation meets each requirement.

First, under D.C. Circuit precedent, "sufficient injury in fact" exists when an agency "fail[s] to fulfill [its] continuing statutory duties under the cultural protection statutes. . . . If the [agency] neglects [its] . . . duties, the Tribe [may] seek relief against the [agency]

pursuant to those statutes . . . ." *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 918 (D.C. Cir. 2003); *see also Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 534-35 (D.C. Cir. 2018) ("In this context, the agency may not properly conclude that its failure to comply with NEPA is harmless simply because the Tribe cannot point to specific historical sites that are at risk. Indeed, placing the burden on the Tribe to show harm was especially inappropriate because the inadequate EIS may well make doing so impossible. See Winter, 555 U.S. at 23, 129 S.Ct. 365.").

That is the situation here. The Defendants' March 12 Decision effectively precludes the Cherokee Nation from benefiting from the consultation mandated by federal law that affords Tribal Nations the right to protect religious and cultural sites within their treaty and historical territory. Here, the Defendants' March 12 Decision is based on a Final EA and FONSI that are fundamentally flawed due to Defendants' total failure to, at a minimum, invite the Cherokee Nation to consult on the Kings Mountain Site project as required by NHPA and the Section 106 guidelines promulgated by the Advisory Council on Historic Preservation—underscoring the deficient analysis to the human environment provided in the Final EA. *See* 54 U.S.C. 306108; 30 C.F.R. § 800.2(c)(2); Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section106 Review Process: A Handbook* 10 (2012) ("Even when there are no federally recognized Indian tribes with tribal lands in the [area] where the project is located, *the agency must still make a reasonable and good faith effort to identify and consult with any Indian tribes that attach religious and cultural significance to historic properties that may be affected by the undertaking. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance.* Therefore, agencies are required to identify Indian tribes that may attach religious and cultural significance

to historic properties in the area of the undertaking, even if there are no tribes near the area of the undertaking or within the state.") (emphasis added). Thus, the fact that Cherokee Nation is no longer located in Cleveland County, North Carolina, in no way obviates Defendants' lawful obligation to engage with the Cherokee Nation to identify and protect historical sites and cultural resources within the Cherokee Nation's historical homelands *before* undertaking a major federal agency action within Cherokee aboriginal territory.

Furthermore, if the United States and Catawba were to prevail, the Cherokee Nation would lose the opportunity to protect Cherokee lands and resources from possible destruction. Hence, the loss of these rights constitutes a concrete and imminent injury for Article III standing.

Second, the Cherokee Nation's injury is directly traceable to the Defendants' March 12 Decision, and deficient Final EA and FONSI. Declaration of Elizabeth Toombs, Cherokee Nation Tribal Historic Preservation Officer ("Toombs Decl.") ¶¶ 6-9, ECF No. 17-2. If Defendants take the lands into trust for Catawba, there will be no opportunity to cure the deficient Final EA and FONSI that, among other things, fail to provide any analysis of the impact of the project based on consultation with the Cherokee Nation or any mitigation measures that may be determined appropriate after consulting with the Cherokee Nation. Furthermore, in the event Catawba begins construction on these lands, the Cherokee Nation will lose the opportunity to protect its Cherokee cultural patrimony—an outcome that specifically contradicts and violates NEPA and NHPA.

Third, a resolution of this litigation in favor of the Cherokee Nation would prevent the injury the Cherokee Nation faces and uphold the stated principles of NEPA and NHPA. *Oglala Sioux Tribe*, 896 F.3d at 529 ("Moreover, if review is delayed until final judgment, and vulnerable but as-yet-unidentified historical, cultural, or religious sites are damaged in the

interim, the court will be unable to remedy that injury to the public interest—an interest that NEPA's procedural mandate was intended to vindicate.") (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-51, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)).

B. The Cherokee Nation Should Be Granted Intervention as of Right

Under Rule 24(a)(2), an applicant is entitled to intervene if (1) the intervention motion is "timely," (2) the movant "claims an interest relating to the property or transaction that is the subject of the action," (3) the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (4) the existing parties do not already "adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Cherokee Nation satisfies all four requirements.

1. The Cherokee Nation's Motion Is Timely

The D.C. Circuit evaluates timeliness "in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008) (citations omitted). At its core, the timeliness requirement "is aimed primarily at preventing potential intervenors from unduly disrupting litigation[] to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014).

Here, there was no delay in seeking intervention. The Cherokee Nation is filing this motion before the Department has completed the land-into-trust acquisition, before Catawba has begun construction on the land, and before an answer or dispositive motion has been filed by Defendants. Further, the Court at the recent hearing on the motion for preliminary injunction stated that the Eastern Band would have an opportunity to file an updated motion for temporary restraining order. April 15, 2020 Hr'g Tr. 29. Hence, no party can claim to be prejudiced by any

delay caused by this motion or credibly argue that intervention would unduly disrupt this nascent litigation.

2. The Cherokee Nation Has An Interest Relating To The Subject Of This Action

The Cherokee Nation has a direct interest in this action. The "transaction … that is the subject of the action," Fed. R. Civ. P. 24(a)(2), bears directly on the Cherokee Nation's right to protect Cherokee cultural patrimony in the Cherokee historical territory. For another, the D.C. Circuit has held that where the would-be intervenor "has constitutional standing, it *a fortiori* has 'an interest relating to the property or transaction which is the subject of the action.'" *Connecticut v. United States Dep't of the Interior*, 344 F. Supp. 3d 279, 304 (D.D.C. 2018) (quoting *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015) (quoting Fed. R. Civ. P. 24(a)).

3. The Cherokee Nation's Interests Would Be Impaired if the United States and Catawba Nation Prevail

If the United States and Catawba prevail in this action, the Cherokee Nation would be prohibited from studying the Kings Mountain Site and protecting Cherokee cultural resources at the Site. These circumstances satisfy the requirement that the disposition of this case "may as a practical matter impair or impede" the Cherokee Nation's ability to protect its rights and interests. Fed. R. Civ. P. 24(a)(2).

4. The Parties May Not Adequately Represent the Cherokee Nation's Interests

The last requirement for intervention as of right requires showing that the current Plaintiff's "representation of [the would-be intervenor's] interest 'may be' inadequate." *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The D.C. Circuit has described this requirement as both "low" and "not onerous."

Crossroads Grassroots, 788 F.3d at 321. Indeed, "a movant ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation." *Id.* (quotation marks omitted). The minimal showing is easily made here.

First, representation may be inadequate when the would-be intervenor's stake in the litigation is "narrower" than that of the existing plaintiff. *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986). Here, the Eastern Band has a broader set of concerns related to the trust acquisition. While the Cherokee Nation agrees with the Eastern Band's positions —and believes they are a sound basis for judgment against Defendants on the merits—the Cherokee Nation has a narrower interest in protecting Cherokee cultural resources.

Second, the Cherokee Nation has different relationships and experiences with federal agencies when protecting Cherokee cultural resources. Despite having a government-to-government relationship with federal agencies that involves consultation on properties in Cleveland County, North Carolina, Defendants made no attempt to contact, much less consult the Cherokee Nation on Catawba's Kings Mountain Site land-into-trust application, planning and development related to an environmental assessment at any stage, and their March 12 Decision. Further, while the Final EA provides contact information for the Eastern Band's THPO, no such listing is provided for the Cherokee Nation's THPO, should the project move forward and mitigating measures be invoked in the event there is a significant find after construction begins.

Thus, only the Cherokee Nation can adequately represent itself in explaining the hardships resulting from the Defendants' failures to protect Cherokee lands and resources.

C. In the Alternative, the Cherokee Nation Should Be Permitted to Intervene Under Rule 24(b)

The Cherokee Nation alternatively requests permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B). As the D.C. Circuit has explained, Rule 24(b)(1)(B) allows this

Court to permit intervention by any entity that makes a timely motion and that has "a claim or defense that has a question of law or fact in common with the main action." *EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Rule 24(b) also requires the court to consider "whether the proposed intervention 'will unduly delay or prejudice the adjudication of the original parties' rights.'" *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007) (quoting Federal Rule of Civil Procedure 24(b)(3)).

All of these factors support intervention here. First, as explained, the Cherokee Nation's motion is timely. *See supra pp* 8-9 Second, because the Cherokee Nation "seeks to uphold … the same actions that Plaintiff[] seek[s] to overturn," the Cherokee Nation's defenses "and the main action obviously share many common questions of law and perhaps of fact." *Franconia Minerals (US) LLC v. United States*, 319 F.R.D. 261, 268 (D. Minn. 2017). Moreover, the Nation will "present defenses to the precise claims brought by" the Eastern Band. *Van Antwerp*, 523 F. Supp. 2d at 10. Third, permitting the Cherokee Nation to intervene will not unduly delay or prejudice the adjudication of any party's rights. This Cherokee Nation is filing its motion to intervene less than 46 days after the initial complaint was filed, and the Cherokee Nation does not seek to inject any novel issue into the case that could cause delay.

The Supreme Court, in granting permissive intervention in an original action, recognized that Indian Tribes' "participation in litigation critical to their welfare should not be discouraged." *Arizona v. California*, 460 U.S. 605, 615 (1983). Consistent with that recognition, this Court has routinely granted tribal motions to intervene under Rule 24(b) to oppose federal agency decisions in which tribal rights under NEPA and the NHPA were allegedly violated. The same result is warranted here.

CONCLUSION

The Court should grant the Cherokee Nation's motion to intervene under Federal Rule of Civil Procedure 24(a) or, in the alternative, under Rule 24(b).

Respectfully submitted this 1st day of May, 2020.

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CERTIFICATE OF SERVICE

I, Sara E. Hill, hereby certify that a copy of the foregoing was served electronically by the Court CM/ECF system on May 1, 2020, upon all counsel of record.

By: /s/ Paiten Taylor-Qualls